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EX PARTE OR LATE FILED

September 16, 1997

BY HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, DC 20554

Re: Written Ex Parte Presentation -
WT Docket No. 97-82

Dear Mr. Caton:

Cook Inlet Region, Inc., hereby gives notice of written ex parte presentations in the above-referenced proceeding.

The presentations were made in the form of the attached letter and article, which were delivered to individuals in the offices of Chairman Hundt and Commissioners Quello, Ness, and Chong, and to Jon Garcia in the Office of Plans and Policy.

Two copies of the letter and article are included with this notification pursuant to Section 1.1206(b)(1) of the Commission's Rules, 47 C.F.R. § 1.1206(b)(1).

Sincerely,

Mark F. Dever

Enclosures

EX PARTE OR LATE FILED

COOK INLET COMMUNICATIONS

September 16, 1997

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street N.W., Room 222
Washington, DC 20554

Re: WT Docket No. 97-82

Dear Mr. Caton:

We understand that the Commission is considering whether to offer a deferral of broadband PCS C block installment payment obligations.

While we disagree with any departure from the established C block rules, we do believe that -- to the extent the Commission is considering such an option -- the Commission must take the opportunity to amend the C block promissory notes and security agreements to perfect the Commission's position in any subsequent bankruptcy proceeding.

I am enclosing an article entitled "Prepetition Waivers of the Automatic Stay: A Secured Lender's Guide," which is particularly instructive on this issue.

Sincerely,

Steve C. Hillard

cc: Rudolfo L. Baca
David R. Siddall
Jane Mago
Jackie Chorney
Jon C. Garcia

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Prepetition Waivers of the Automatic Stay: A Secured Lender's Guide

*By Michael St. Patrick Baxter**

INTRODUCTION

The automatic stay is one of the most formidable obstacles to a secured lender in the bankruptcy of a borrower. Immediately upon the filing of a bankruptcy petition, the automatic stay of section 362(a) of the Bankruptcy Code[1] comes into effect, prohibiting almost all actions, formal or informal, that may be taken by any person against the debtor or its assets.[2] This

*Partner, Covington & Burling, Washington, D.C.; member of the bars of the District of Columbia and Ontario, Canada. I am grateful to Philip R. Stansbury, Oscar M. Garibaldi, Patrick Johnson, Jr., Evan D. Flaschen, and Joan S. Baxter for their insightful comments on earlier drafts of this Article. Special thanks to my associate Maneesha Mithal for her assistance in the preparation of this Article. The views expressed are solely those of the author.

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified in scattered sections of 11 U.S.C. and 28 U.S.C.), *as amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended in scattered sections of 11 U.S.C.); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in scattered sections of 11 U.S.C.); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (codified as amended in scattered sections of 11 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Treasury, Postal Service and General Government Appropriations Act of 1990, Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended in scattered sections of 28 U.S.C.); Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-121, 107 Stat. 1153 (codified as amended in scattered sections of 28 U.S.C.); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320934, 108 Stat. 1976, 2135; and Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 3146 (codified as amended in scattered sections of 11 U.S.C., 18 U.S.C., and 28 U.S.C.) [hereinafter Bankruptcy Code].

2. Section 362(a) of the Bankruptcy Code provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities

effectively stops the secured lender in its tracks and precludes the lender from commencing or continuing any action to enforce its lien rights without relief from the bankruptcy court.

As a result of the recent rulings of several bankruptcy courts, many lenders are now arming themselves with what has been hailed as a new defense to the automatic stay – the prepetition stay waiver. Long thought to be unenforceable as against public policy, a few courts have recently held prepetition stay waivers to be enforceable. Some courts that have addressed the issue, however, continue to refuse to enforce stay waivers on public policy grounds. Because the issue has not been addressed by many courts, it is hard to predict how it ultimately will be resolved. Nonetheless, on the basis of the few decisions that have addressed the issue, the trend appears to be moving toward the enforcement of stay waivers.

The issue of whether prepetition stay waivers are enforceable is a difficult one. The difficulty reflects the tension between the public policies favoring out-of-court workouts on the one hand and protecting the collective interests of the debtor's creditors on the other. Bankruptcy courts that have tackled the issue have used several different approaches. Not surprisingly, the results appear to be conflicting.

The purpose of this Article is to offer some guidance to secured lenders in the use of prepetition waivers of the automatic stay. As a foundation, the Article includes a discussion of the legal theories currently applied in the enforcement or invalidation of prepetition stay waivers. An analysis of whether such waivers are unenforceable on public policy grounds, however, is beyond its scope.[3]

Investor Protection Act of 1970, operates as a stay, applicable to all entities, of

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 U.S.C. § 362(a) (1994).

3. For a discussion of this issue, see, e.g., William Bassin, *Why Courts Should Refuse to Enforce*

Part I of this Article examines the stay waiver case law. At first blush, much of the case law appears to be conflicting. The author contends, however, that if one looks past the judicial rhetoric to the facts of each case, it becomes apparent that the results of the cases are reconcilable on the basis of the debtor's likelihood of reorganization. Part II of the Article discusses the factors that appear to be influential in the judicial enforcement of prepetition stay waivers. It is argued that the single most important factor in the enforcement of a stay waiver is the debtor's prospect of reorganization.

The author concludes that stay waivers, while not capable of neutralizing the automatic stay, are useful devices to secured lenders for several reasons. First, a stay waiver provides an additional argument for stay relief. Second, it may preclude the debtor from objecting to a lift-stay motion. Third, it may shift the burden of production in the lift-stay hearing from the moving creditor to the debtor. Finally, it may reduce the home-court advantage the debtor often enjoys in bankruptcy court. The Article includes several model provisions that may be used by secured lenders in workouts.[4] The author, however, counsels against the indiscriminate use of prepetition stay waivers. Their use should be limited to workouts in which the lender reasonably believes that the debtor would have no realistic prospect of reorganization in the event of its failure following the workout. The indiscriminate use of prepetition stay waivers, it is contended, is ineffective and potentially destructive to the device.

THE CASE LAW

Courts have taken three basic approaches in addressing the enforceability of prepetition waivers of the automatic stay. The first approach is to uphold the stay waiver in broad terms. The second approach is to reject the stay waiver as against public policy. The third approach is to determine the enforceability of the stay waiver on a case-by-case basis.

CASES UPHOLDING STAY WAIVERS IN BROAD TERMS

The first reported case upholding a prepetition stay waiver was in 1988. While the early cases in which stay waivers were upheld involved single-asset debtors filing for bankruptcy in bad faith, the language of these cases was quite broad and did not restrict the enforcement of the stay waiver to the facts of the particular cases.

Pre-Petition Agreements that Waive Bankruptcy's Automatic Stay Provision, 28 IND. L. REV. 1 (1994), and William J. Burnett, *Prepetition Waivers of the Automatic Stay: Automatic Enforcement Equals Automatic Trouble*, 5 J. BANKR. L. & PRAC. 257 (1996).

4. The model provisions consist of a prepetition stay waiver, a representation regarding the debtor's prospect of reorganization, and a representation regarding the debtor's equity in the collateral. *See infra* notes 77, 93, and 98.

In re Citadel Properties, Inc.

In re Citadel Properties, Inc.,[5] was the first reported case to uphold a prepetition waiver of the automatic stay. In *Citadel Properties*, the debtor had defaulted on its obligations to a secured creditor and entered into a settlement agreement pursuant to which the creditor would be entitled to immediate relief from the automatic stay if the debtor were to file a petition in bankruptcy. The debtor filed for bankruptcy and the creditor moved for relief from the automatic stay pursuant to the terms of the settlement agreement.

The bankruptcy court granted relief on two grounds. First, the court held that sufficient cause existed for lifting the stay because the bankruptcy petition was filed in bad faith.[6] The court made a finding of bad faith based on three main factors: (i) the debtor was not an ongoing business that could have been rehabilitated, (ii) the debtor filed for bankruptcy less than one hour prior to the scheduled foreclosure of the property, and (iii) the debtor had no realistic probability of a successful reorganization.[7]

Alternatively, the court held that the creditor was entitled to enforce the terms of the prepetition agreement lifting the automatic stay.[8] In enforcing the stay waiver, the court cited three cases which, according to the court, "confronted similar issues and determined that pre-petition agreements regarding relief from the stay were enforceable in bankruptcy."[9] A review of those cases, however, reveals that, in fact, no such precedent existed. The first case cited by the court, *In re International Supply Corp. of Tampa, Inc.*,[10] did not even involve a prepetition agreement for lifting the automatic stay. The second case cited, *B.O.S.S. Partners I v. Tucker (In re B.O.S.S. Partners I)*,[11] dealt not with a prepetition agreement but with a postpetition, court-approved agreement to lift the stay. Finally, in the third case cited by the court, *In re Gulf Beach Development Corp.*,[12] the prepetition agreement did not contemplate the consequences of a bankruptcy, much less waive the protection of the automatic stay. Thus, some commentators have strongly criticized the reasoning of the *Citadel Properties* court for upholding the prepetition waiver of the automatic stay.[13]

5. 86 B.R. 275 (Bankr. M.D. Fla. 1988).
6. *Id.* at 277.
7. *Id.* at 276.
8. *Id.* at 277.
9. *Id.* at 276.
10. 72 B.R. 510 (Bankr. M.D. Fla. 1987).
11. 37 B.R. 348 (Bankr. M.D. Fla. 1984).
12. 48 B.R. 40 (Bankr. M.D. Fla. 1985).
13. *See* Bassin, *supra* note 3, at 9 ("[I]n *In re Citadel*, Judge Proctor erroneously cited several cases in an effort to justify enforcing an independent pre-petition agreement that purported to waive the automatic stay."); Daniel B. Bogart, *Games Lawyers Play: Waivers of the Automatic Stay in Bankruptcy and the Single Asset Loan Workout*, 43 UCLA L. REV. 1117, 1138 (1996) ("Perhaps the most obvious flaw in the opinions supporting the waivers (*Citadel Properties* and *Club Tower*) is the courts' heavy reliance on scanty and questionable precedent.").

Regardless of the questionable precedent upon which the *Citadel Properties* court relied, its enforcement of the stay waiver was broad and unqualified. The court held simply that "the terms of the prepetition stipulation are binding upon the parties."[14] As such, *Citadel Properties* provided lenders with a sweeping precedent on which to rely when seeking enforcement of stay waivers in workout agreements.

In re Club Tower, L.P. *and* In re Hudson Manor Partners, Ltd.

After the *Citadel Properties* decision, Judge Hugh Robinson, Jr., of the U.S. Bankruptcy Court for the Northern District of Georgia, issued two decisions upholding prepetition waivers of the automatic stay. In *In re Club Tower, L.P.*,[15] the debtor and a secured lender entered into a forbearance agreement which provided that, as long as the debtor fulfilled certain conditions, the lender would not exercise its secured-creditor rights. As part of this forbearance agreement, the debtor agreed that the lender would be entitled to immediate relief from the automatic stay if the debtor filed for bankruptcy. Like the court in *Citadel Properties*, the bankruptcy court in *Club Tower* granted the lender relief from the automatic stay on two alternative grounds: (i) the filing was in bad faith, and (ii) the existence of a prepetition waiver of the automatic stay.[16]

The *Club Tower* court found that the debtor had filed for bankruptcy in bad faith because the debtor had only one asset, no employees to protect, and virtually no possibility of rehabilitation.[17] The court found bad faith even though the debtor claimed there was sufficient equity in the collateral.[18] According to the court, even if there was a possibility of successful reorganization, this factor could not transform a finding of bad faith.[19] Notably, the debtor's allegation of equity in the collateral did not prevent the court from finding that "[t]here is no going concern to preserve, there are no employees to protect, and there appears to be little hope of rehabilitation."[20]

Alternatively, the court granted stay relief to the lender because of the prepetition stay waiver.[21] The court distinguished prepetition waivers of the automatic stay from waivers of full bankruptcy protection by noting that, in the case of a prepetition waiver, the debtor still has the right to conduct an orderly liquidation, to assume or reject executory contracts,

14. *Citadel Properties*, 86 B.R. at 276.
15. 138 B.R. 307 (Bankr. N.D. Ga. 1991).
16. *Id.* at 310.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 311.

and to enjoy other protections of the Bankruptcy Code.[22] Moreover, the court noted that enforcement of the prepetition waiver would encourage out-of-court settlements.[23]

The facts of *In re Hudson Manor Partners, Ltd.*,[24] were similar to those of *Club Tower*. In *Hudson Manor*, Judge Robinson upheld the stay waiver employing the same reasoning he articulated in *Club Tower*, with one significant difference.[25] The court's holding in *Hudson Manor* was not alternatively based on a finding of bad faith on the part of the debtor. Rather, the court granted the creditor's lift-stay motion simply on the basis of the prepetition stay waiver.[26]

It is not evident in *Hudson Manor* whether the debtor argued that there was a realistic prospect of reorganization or that there was equity in the collateral. One effect of the stay waiver in *Hudson Manor* was to shift the burden of production from the moving party to the debtor. It appears the debtor failed to produce any evidence as to its prospect of reorganization or its equity in the collateral.[27]

Club Tower, *Hudson Manor*, and *Citadel Properties* created strong legal precedent supporting the enforcement of prepetition waivers of the automatic stay. Much criticism, however, has been leveled at these and other cases that broadly enforce prepetition stay waivers.[28] As previously noted, it is true that the legal precedent cited by the bankruptcy court in *Citadel Properties*, the first reported case to enforce a prepetition stay waiver, is questionable at best. Moreover, the argument advanced by cases, such as *Club Tower*, that a stay waiver does not really deprive the debtor of the protection of the Bankruptcy Code appears shortsighted and somewhat disingenuous. As a practical matter, if the stay is lifted in favor of a secured creditor in a single-asset case or a case in which the collateral is necessary to the future of the debtor, the enforcement of a stay waiver will surely signal the end of the bankruptcy case.[29]

Regardless of the merits of the arguments against the enforcement of

22. *Id.*

23. *Id.* at 312.

24. 28 Collier Bankr. Cas. 2d (MB) 221 (Bankr. N.D. Ga. 1991).

25. *Id.* at 222.

26. *Id.* at 223.

27. In a prepetition agreement, the debtor had also conceded that it had no equity in the collateral and that the collateral was not necessary to any reorganization. *Id.*

28. *See, e.g.*, Farm Credit of Cent. Fla., ACA v. Polk, 160 B.R. 870, 873 (M.D. Fla. 1993); *In re* Sky Group Int'l, Inc., 108 B.R. 86, 88-89 (Bankr. W.D. Pa. 1989); *see also* Bassin, *supra* note 3; Bogart, *supra* note 13, at 1117; Burnett, *supra* note 3.

29. Prepetition stay waivers are less likely to be obtained in cases where the collateral is not necessary to the debtor's future because, in such cases, neither the collateral nor the lender is important enough to the debtor to warrant an agreement to give up the protection of the automatic stay. Moreover, if the debtor gives a stay waiver to such a lender, it is reasonably certain that the debtor's other secured lenders will not rest until they too receive a stay waiver.

prepetition stay waivers, however, the reality is that there is now significant case law in support of their enforcement. It cannot be disputed that some bankruptcy courts are now inclined to enforce stay waivers.[30] Therefore, although the debate will surely continue, secured lenders would be well advised to know the parameters within which the enforcement of a prepetition stay waiver is most likely.

CASES REJECTING STAY WAIVERS AS AGAINST PUBLIC POLICY

Despite the existence of the legal precedents supporting the enforcement of prepetition waivers of the automatic stay, some courts have refused to enforce them on public policy grounds. These cases seemingly contradict the cases that enforce stay waivers. If one looks past the judicial rhetoric in the opinions and examines the facts of each case, however, it becomes apparent that the results of the cases are reconcilable on the basis of the likelihood of the debtor's reorganization. In the cases rejecting stay waivers, the underlying, although often unarticulated, reason for the rejection is that there was a realistic prospect of the debtor's reorganization or, at least, there was no evidence that the debtor did not have a realistic prospect of reorganization. In this fundamental regard, these cases are essentially identical to the cases that have enforced prepetition stay waivers.

In re Sky Group International, Inc. *and* Farm Credit of Central Florida, ACA v. Polk

Two bankruptcy courts have unequivocally invalidated prepetition waivers based on their effect on third parties. First, the bankruptcy court in *In re Sky Group International, Inc.*,[31] refused to enforce a prepetition stay waiver entered into between the debtor and a creditor bank. The debtor agreed to assume the debts of another entity that were owed to the bank. Included in the assumption agreement was a provision to the effect that, in the event of bankruptcy, the debtor would consent to the bank's motion for relief from the automatic stay. Subsequently, an involuntary bankruptcy petition was filed against the debtor. The bankruptcy court refused to enforce the stay waiver, stating that the purpose of the automatic stay is to protect all creditors and treat them equally.[32] If the waiver was enforced, the court reasoned, one creditor would have benefitted at the expense of all others.[33]

The critical point in this case, however, appears to have been the court's finding that the bank's claim was adequately protected in the bankruptcy

30. "The apparent trend in decisional law, particularly in the context of single asset cases, is to enforce contractual waivers of the automatic stay." *In re* Pease, 195 B.R. 431, 432 (Bankr. D. Neb. 1996).

31. 108 B.R. 86 (Bankr. W.D. Pa. 1989).

32. *Id.* at 89.

33. *Id.*

proceedings because the value of the collateral substantially exceeded the bank's claim.[34] This was not a case where there was no realistic prospect of reorganization. In this crucial respect, this case is both distinguishable from, and reconcilable with, the cases that have sustained stay waivers. Looking past its strong rhetoric, the result in *Sky Group* is easily reconciled with those cases enforcing stay waivers on the basis of the debtor's prospect of reorganization.

In *Farm Credit of Central Florida, ACA v. Polk*,[35] the district court affirmed the decision of the bankruptcy court, which had refused to enforce a prepetition waiver of the automatic stay.[36] In so doing, the district court distinguished this case from prior cases in which prepetition waivers were enforced. The court noted that, in cases in which the waiver had been upheld, the facts disclosed a bad-faith, single-asset bankruptcy case with no possibility of successful reorganization.[37] In *Polk*, the court found a successful business enterprise with a significant number of employees and creditors.[38] The *Polk* court refused to enforce the prepetition stay waiver, noting that upholding the waiver in business enterprise cases would be inconsistent with the objectives of the automatic stay, which include protecting all creditors and treating them equally.[39]

Again, it appears that the critical point in *Polk* was the bankruptcy court's finding that there was a reasonable possibility of a successful reorganization within a reasonable time.[40] This was not a case where there was no realistic prospect of reorganization. Therefore, as in *Sky Group*, the result in *Polk* is reconcilable with the cases that have sustained stay waivers on the basis of the debtor's prospect of reorganization.

In re Jenkins Court Associates Ltd. Partnership

The bankruptcy court in *In re Jenkins Court Associates Ltd. Partnership*[41] articulated a different theory for its refusal to enforce a prepetition stay waiver. The court held that the enforcement of a prepetition waiver would be tantamount to a restraint against filing for bankruptcy,[42] which clearly is unenforceable as against public policy. In *Jenkins Court*, the stay waiver provided that the "lender shall immediately be entitled to relief from the stay."[43] The court refused to enforce this provision on the basis that its enforcement in a single-asset case would be equivalent to enforcing a

34. *Id.*
35. 160 B.R. 870 (M.D. Fla. 1993).
36. *Id.* at 875.
37. *Id.* at 873.
38. *Id.*
39. *Id.*
40. *Id.* at 874.
41. 181 B.R. 33 (Bankr. E.D. Pa. 1995).
42. *Id.* at 37.
43. *Id.* at 35.

waiver of bankruptcy protection.[44] Just as a waiver of bankruptcy protection is against public policy, the court reasoned, a waiver of the automatic stay is against public policy as well.[45]

While this case may appear to conflict with *Hudson Manor* and other cases sustaining stay waivers, the results of the cases are consistent. One must look past the judicial rhetoric. Although the articulated basis for the decision in *Jenkins Court* was public policy, it is submitted that the decision actually turned on the fact that there was no evidence of the likelihood of the debtor's reorganization. First, the lender in *Jenkins Court* made no attempt to adduce any evidence on the debtor's prospect of reorganization. The lender, to the surprise of the bankruptcy court, relied solely on the stay waiver and on the debtor's prepetition admissions in the waiver that there was no equity in the collateral, no chance of a successful reorganization, and bad faith in the filing of the bankruptcy petition.[46] Therefore, apart from the stay waiver, there was no evidence before the court as to the debtor's prospect of reorganization.

Second, the parties in *Jenkins Court* had stipulated that the bankruptcy court should not conduct an evidentiary hearing as to whether the automatic stay should be lifted but should only resolve the legal question of whether the stay waiver alone entitled the lender to stay relief. A stay waiver, by itself, will not result in the lifting of the automatic stay if the circumstances for stay relief under section 362(d) of the Bankruptcy Code do not otherwise exist;[47] there must be other cause for stay relief.[48] Because the lender in *Jenkins Court* failed to adduce any evidence that the

44. *Id.* at 37.

45. *Id.* Courts upholding prepetition stay waivers have categorically rejected the view articulated in *Jenkins Court* and have distinguished prepetition stay waivers from waivers of the right to file bankruptcy. *See, e.g., In re* Club Tower, L.P., 138 B.R. 307, 311-12 (Bankr. N.D. Ga. 1991). These courts note that, unlike a restraint against bankruptcy which involves a waiver of all rights and benefits the debtor would otherwise have, prepetition waivers involve the waiver of only a single benefit of the Bankruptcy Code. The debtor still enjoys the right, among other things, to "conduct an orderly liquidation, discharge debt or pay it back on different terms, assume or reject executory contracts, sell property free and clear of liens, and pursue preferences and fraudulent conveyance claims." *Id.* at 311.

46. The court noted that it was

> somewhat perplexed as to why JCP [the lender] agreed to bifurcate the issues and rest on the very limited record now before the Court. JCP's exclusive reliance on the admissions in Section 3(d)(ii) and (iii) of the Second Amended Settlement Agreement as proof that (1) the Debtor has no equity in the Project and has no chance of a successful reorganization, and (2) that the Debtor commenced this bankruptcy case in bad faith, is ill-founded.

Jenkins Court, 181 B.R. at 36.

47. *Id.*

48. Of course, if cause exists for stay relief under § 362(d)(1) or (2) of the Bankruptcy Code, 11 U.S.C. § 362(d)(1), (2) (1994 & West Supp. 1996), it may be argued that a stay waiver is superfluous. A stay waiver, however, may still provide advantages to the secured lender.

debtor lacked any realistic prospect of reorganization or that other cause existed for stay relief, the bankruptcy court did exactly as one would have expected: it denied the lender's motion for stay relief.[49] Despite its rhetoric, the result in this case is consistent with the cases that have sustained stay waivers.

Of importance in *Jenkins Court* is that the bankruptcy court did not summarily dismiss the debtor's admissions of no equity in the collateral and no chance of a successful reorganization. The court held that it would consider these admissions at the evidentiary hearing as a significant factor in determining whether the lender should be granted relief from the automatic stay.[50] Therefore, although the stay waiver was not enforced, the debtor's admissions of no equity and no prospect of reorganization would be of assistance to the lender in persuading the court at an evidentiary hearing that the stay should be lifted.[51]

In re Pease

One recent bankruptcy case invalidated a prepetition waiver of the automatic stay on novel grounds. In *In re Pease*,[52] the debtors and a creditor bank entered into a prepetition agreement which contained two prohibitions. First, the debtors were prohibited from filing a voluntary bankruptcy petition. Second, if the debtors filed such a petition, the debtors were prohibited from resisting both a motion to lift the automatic stay and a motion to dismiss the bankruptcy case.

The bank conceded that the prohibition against filing for bankruptcy was unenforceable but sought to enforce the debtors' waiver of the automatic stay. Although the bankruptcy court acknowledged that the trend in the case law was to enforce prepetition stay waivers, it held that the waiver of the automatic stay was unenforceable *per se* for several reasons.[53] First, the court reasoned that the waiver was invalid because the pre-bankruptcy debtor did not have the capacity to waive the rights bestowed by the Bankruptcy Code on a Chapter 11 debtor-in-possession, which is a separate

49. Indeed, it is possible that the bankruptcy court would have enforced the stay waiver if the lender had put forward persuasive evidence that the debtor did not have any realistic prospect of reorganization. See *Jenkins Court*, 181 B.R. at 37 (emphasis added), where the court noted:

> *In the absence of a complete evidentiary hearing wherein other grounds for modifying the stay are established*, the Court believes that enforcement of the pre-petition waiver of the automatic stay in this instance too closely approximates the more reviled prohibition against filing for bankruptcy protection. Accordingly, the waiver of the automatic stay . . . will not be enforced.

50. *Id.*
51. *Id.*
52. 195 B.R. 431 (Bankr. D. Neb. 1996).
53. *Id.* at 433.

entity with separate rights and fiduciary duties to creditors.[54] Second, the court deduced that the Bankruptcy Code explicitly invalidates provisions of private agreements that deprive the debtor of the use and benefit of property upon the filing of a bankruptcy case.[55] Finally, the court reasoned that the Bankruptcy Code extinguishes the private right to contract around its essential provisions.[56]

Although articulated differently than other courts that have invalidated stay waivers, the decision in *Pease* essentially was based on the court's desire to protect the other creditors in the case.[57] In *Pease*, the creditor seeking to enforce the stay waiver was fully secured and the potential detriment to other creditors, if the waiver was enforced, would have been substantial. Again, it was not a case where there was no realistic prospect of the reorganization of the debtor. Therefore, the result in *Pease* is reconcilable with the cases that have sustained stay waivers on the basis of the debtor's prospect of reorganization.

COURTS UPHOLDING STAY WAIVERS ON A CASE-BY-CASE BASIS

Several courts have rejected the argument that prepetition waivers are against public policy but these courts also contend that stay waivers should not be enforced in all circumstances. They have held that the enforceability of stay waivers should be determined on a case-by-case basis. A review of these cases reveals, not surprisingly, that the single most important factor in the enforcement of a stay waiver is the debtor's prospect of reorganization.

In re Cheeks

In *In re Cheeks*,[58] a debtor entered into a forbearance agreement which provided that, if the debtor filed for bankruptcy, it would not oppose or object to the secured creditor's motion for relief from the automatic stay. The debtor subsequently filed for bankruptcy under Chapter 13 of the Bankruptcy Code. The creditor filed a lift-stay motion based on the debtor's prepetition waiver. The debtor opposed the motion. Significantly, neither the Chapter 13 trustee nor any other creditor or party in interest opposed the motion. The bankruptcy court upheld the waiver.[59]

54. *Id.*
55. *Id.* at 433-34.
56. *Id.* at 434.
57. The court stated that the "judicial enforcement of a contractual waiver of the automatic stay would permit a single creditor to opt out of the collective process mandated by the Bankruptcy Code to the potential detriment of the debtor and other creditors. This should not be permitted." *Id.*
58. 167 B.R. 817 (Bankr. D.S.C. 1994).
59. *Id.* at 820.

First, the court noted that the enforcement of prepetition waivers was not restricted to single-asset cases.[60] Second, the court observed that it would have considered the objections of other parties.[61] Finally, the court reasoned that where, as in this case, the debtor was the only party objecting to the creditor's lift-stay motion in derogation of its prepetition waiver, the debtor's objection would not be heard and the lift-stay motion would be treated as if it were unopposed.[62] The court noted:

> These [prepetition stay waiver] agreements do not oust this Court's Jurisdiction to hear objections to stay relief filed by other parties in interest. It simply means that this Court will give no weight to a Debtor's objection as this conflicts with and is in derogation of the previous agreement. When there are no other objections to stay relief, this Court looks upon the motion to lift the stay as being totally unopposed and will render relief as though the motion is in default.[63]

Cheeks represents the high-water mark on the enforceability of stay waivers. The decision is remarkable for its breadth and resoluteness. It reaffirmed, in unequivocal terms, that stay waivers are not unenforceable *per se*. The *Cheeks* court refused to limit stay waivers to single-asset real estate cases.[64] Most importantly, it used the existence of a stay waiver to preclude any attempt by the debtor to oppose stay relief. The significance of this latter point cannot be overstated. The stay waiver allowed the secured creditor to obtain stay relief on a default basis despite the objections of the debtor.[65]

Again, however, the critical fact in *Cheeks* was likely the absence of any realistic prospect of the debtor's reorganization. Although the court did not make any findings regarding the debtor's likelihood of reorganization, it may be reasonably inferred that the debtor had no realistic prospect of reorganization because neither the Chapter 13 trustee, the creditors, nor other parties in interest objected to the lift-stay motion.

In re Powers

In *In re Powers*,[66] the bankruptcy court held that a prepetition stay waiver is enforceable in appropriate circumstances. The court stated that a stay

60. *Id.* at 819.
61. *Id.*
62. *Id.*
63. *Id.*
64. Although *Cheeks* was a Chapter 13 case and may be distinguished on that basis, the court explicitly refused to limit its ruling to Chapter 13 cases. *See id.* (stating "[a]n individual debtor in one chapter should have no greater ability to escape the burdens of an agreement after receiving its benefits that [sic] a debtor in any other chapter").
65. It should be noted, however, that the lift-stay motion would not be handled on a default basis if other parties in interest objected to the relief. *Id.* at 819.
66. 170 B.R. 480 (Bankr. D. Mass. 1994).

waiver is a primary element in determining whether cause exists to grant relief from the automatic stay pursuant to section 362(d)(1) of the Bankruptcy Code.[67] According to the court, once the existence of the waiver is established, the burden shifts to the opposing parties to demonstrate that it should not be enforced.[68] In determining whether the waiver should be enforced, the court articulated several factors that it would consider, including: (i) changes in the economic picture, (ii) changes in the value of the collateral, (iii) benefit to the debtor from the workout agreement, (iv) the extent to which the creditor waived rights or would be otherwise prejudiced if the waiver were not enforced, (v) the effect of enforcement on other creditors, and (vi) the likelihood of a successful reorganization.[69] Contrary to *Cheeks*, the *Powers* court concluded that the debtor could object to the lift-stay motion, even if it had previously agreed not to oppose the motion.[70] The court directed that an evidentiary hearing be conducted to determine whether factors supporting the enforcement of the stay waiver were present.[71]

Although the *Powers* court clearly regarded the likelihood of a successful reorganization as a material factor in the enforcement of a stay waiver, the court did not indicate whether it was any more or less important than the other five enumerated factors. Its importance, however, is apparent in a review of the other factors. Three of the other five factors are inextricably intertwined with the debtor's prospect of reorganization. Changes in the economic picture, changes in the value of the collateral, and the effect of the waiver's enforcement on other creditors all clearly implicate the debtor's prospect of reorganization. An improvement or decline in the economic conditions and an increase or decrease in the value of the collateral each tends to support or erode, as the case may be, the debtor's ability to reorganize. Moreover, if there is no realistic prospect of the debtor's reorganization, the effect of the enforcement of a waiver on other creditors will not be material.[72] Therefore, the *Powers* decision supports the contention that the single most important factor in the enforcement of a stay waiver is the debtor's prospect of reorganization.

In re Darrell Creek Associates, L.P.

A different judge of the same South Carolina bankruptcy court that upheld the stay waiver in *Cheeks* had an opportunity to consider the issue

67. *Id.* at 484.
68. *Id.*
69. *Id.*
70. The court stated that "the existence of the waiver does not preclude third parties, or the debtor, from contesting the motion." *Id.* The *Powers* case may be distinguishable from *Cheeks*, however, because, in *Powers*, the debtor did not appear to expressly waive its right to contest a motion for stay relief.
71. *Id.*
72. It should be noted that, if there is equity in the collateral, there may be a realistic prospect of at least one kind of reorganization, namely a plan of orderly liquidation under Chapter 11.

of prepetition waivers in *In re Darrell Creek Associates, L.P.*[73] *Darrell Creek* involved a workout agreement in which the debtor had agreed not to object to a lift-stay motion filed by the creditor in the event the debtor filed for bankruptcy. The facts of this case differed from *Cheeks* in that third parties filed objections to the creditor's lift-stay motion. Following the reasoning of the *Powers* court, the court in *Darrell Creek* held that, when third-party objections are filed, the court should examine other factors in determining whether the stay should be lifted, including whether there is equity in the collateral and whether there is a likelihood of successful reorganization.[74] The court determined that the lift-stay motion in this case should be granted because there was no reasonable likelihood of an effective reorganization and no equity in the collateral.[75] In *Darrell Creek*, as is the pattern in these cases, the crucial factor in the enforcement of the stay waiver appears to have been the debtor's prospect of reorganization.

STAY WAIVERS IN A NUTSHELL

Unfortunately, there are no clear rules on the enforceability of prepetition waivers of the automatic stay. Some bankruptcy courts appear to have embraced stay waivers as generally enforceable. Some courts have rejected them as unenforceable *per se*. Yet others have held them to be enforceable only in appropriate circumstances. Although a few bankruptcy courts have addressed the issue, the vast majority have yet to deal with it. Moreover, the enforceability of prepetition waivers appears to have been addressed by only one district court on appeal[76] and there are no reported decisions by a bankruptcy appellate panel or a court of appeals.

If one looks past the rhetoric in the opinions of the stay waiver cases, however, one point becomes evident. A stay waiver is not dispositive of the issue of relief from the automatic stay. Indeed, it is not even the most important factor considered by a bankruptcy court in the determination of whether to grant stay relief. As previously discussed, the single most important factor in whether a stay waiver is enforced is the debtor's prospect of reorganization. It is inconceivable that even the most ardent judicial supporters of stay waivers would enforce one in the face of persuasive evidence of a reasonable likelihood of the debtor's reorganization. Nonetheless, stay waivers are a useful tool for secured lenders as they may offer the secured lender several possible advantages.[77]

73. 187 B.R. 908 (Bankr. D.S.C. 1995).

74. *Id.* at 912.

75. *Id.* at 915.

76. Besides the *Polk* decision, the district court in *In re Wheaton Oaks Office Partners Ltd. Partnership*, No. 92 C 3955, 1992 U.S. Dist. LEXIS 19983 (N.D. Ill. Nov. 18, 1992), addressed the issue of stay waivers but remanded the case to the bankruptcy court to conduct a lift-stay hearing to determine whether the stay waiver should be enforced. *Id.* at *11-*12. It should also be noted that *Wheaton Oaks* dealt with the enforceability in a serial Chapter 11 case of a stay waiver that was contained in the prior confirmed plan of reorganization of the debtor.

GUIDELINES FOR THE USE OF STAY WAIVERS

Despite the uncertainty surrounding the enforceability of prepetition stay waivers, a few guiding principles emerge from an analysis of the case law.

A STAY WAIVER IS NOT SELF-EXECUTING

A prepetition waiver of the automatic stay, even if enforceable, does not enable the secured creditor to enforce its lien without first obtaining stay relief from the bankruptcy court. On this point, there is no disagreement. In no reported case has a bankruptcy court permitted a secured creditor to act unilaterally on a stay waiver and take possession of the collateral. It is clear that the secured creditor must first move the bankruptcy court for relief from the automatic stay and the court must grant such relief before the secured creditor is permitted to foreclose on the collateral.[78] This is true even if the parties have contracted to the contrary. To avoid the implication that the lender is attempting to circumvent the jurisdiction of the bankruptcy court, the waiver should include language to the effect that its enforcement is subject to the approval of the bankruptcy court.[79]

77. This form of prepetition stay waiver was drafted by the author on the basis of a review of the case law and the guidelines suggested in this Article.

> *Form of Prepetition Stay Waiver.* In the event that the Borrower files a petition under the Bankruptcy Code or under any other similar federal or state law, the Borrower unconditionally and irrevocably agrees that the Lender shall be entitled, and the Borrower hereby unconditionally and irrevocably consents, to relief from the automatic stay so as to allow the Lender to exercise its rights and remedies under the Loan Documents with respect to the Collateral, including taking possession of the Collateral, collecting rents, foreclosing its mortgage lien or otherwise exercising its rights and remedies with respect to the Collateral. In such event, the Borrower hereby agrees that it shall not, in any manner, oppose or otherwise delay any motion filed by the Lender for relief from the automatic stay. The Lender's enforcement of the right granted herein for relief from the automatic stay is subject to the approval of the bankruptcy court in which the case is then pending.

See also infra notes 93 and 98. It is possible to broaden the waiver to apply also to involuntary cases filed against the debtor. The author suggests, however, that the waiver be limited to voluntary cases to avoid the appearance of overreaching by the lender.

78. *In re* Powers, 170 B.R. 480, 483 (Bankr. D. Mass. 1994); *Wheaton Oaks*, 1992 U.S. Dist. LEXIS 19983, at *8-*9.

79. *See* Bogart, *supra* note 13, at 1227.

DEBTOR'S PROSPECT OF REORGANIZATION

The single most important factor in the enforcement of a stay waiver is the prospect of the reorganization of the debtor;[80] the less likely the debtor's reorganization, the more likely the enforcement of the waiver;[81] on the other hand, the more likely the reorganization of the debtor, the less likely the enforcement of the waiver.[82] Of course, if there is no realistic prospect of reorganization, independent cause exists to lift the automatic stay under section 362(d)(1) of the Bankruptcy Code.[83] In addition, if the debtor does not have any equity in the collateral and the collateral is not necessary to an effective reorganization, cause would also exist under section 362(d)(2).[84] Yet, even in those cases, a stay waiver may be of benefit to the secured lender.

First, the stay waiver will provide an additional argument that cause exists under section 362(d)(1) for stay relief.[85] Second, it may provide a

80. *Powers*, 170 B.R. at 484 (inquiring whether there appears to be the likelihood of a successful reorganization).

81. *See In re* Darrell Creek Assocs., L.P., 187 B.R. 908, 915 (Bankr. D.S.C. 1995) (contending no reasonable likelihood of successful reorganization supports enforceability of waiver).

82. *See* Farm Credit of Cent. Fla., ACA v. Polk, 160 B.R. 870, 874 (M.D. Fla. 1993) (finding reasonable possibility of a successful reorganization supports invalidation of the waiver).

83. Section 362(d) provides as follows:

> On request of a party in interest and after notice and hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization; or
>
> (3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)
>
> (A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
>
> (B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

11 U.S.C. § 362(d) (1994 & West Supp. 1996).

84. *Id.* § 362(d)(2).

85. *Darrell Creek*, 187 B.R. at 912 (finding the stay waiver is a primary element to be considered in the determination of whether cause exists for stay relief under § 362(d)(1)); *Powers*, 170 B.R. at 484 (same).

significant procedural advantage to the moving creditor because, "[o]nce the pre-petition waiver has been established, the burden is upon the opposing parties to demonstrate that it should not be enforced."[86] In lift-stay motions, generally, the creditor seeking to lift the stay bears the burden of production, that is, raising a genuine issue of cause.[87] Once the creditor files a lift-stay motion and establishes the existence of a stay waiver, however, the burden may shift to the opposing parties to demonstrate that the waiver should not be enforced.[88] Finally, the stay waiver may reduce the heavy burden that usually exists in lifting the automatic stay during the exclusivity period.[89]

It is useful in connection with the stay waiver to obtain representations from the debtor as to its inability to reorganize.[90] Such representations will be considered by the bankruptcy court in the lift-stay hearing with any additional evidence offered by the parties.[91] The secured lender should exercise caution in obtaining such representations, however, because they may be inherently suspect and thus may tend to taint the legitimacy of the stay waiver. For example, contrary to the advice of some commentators,[92] it would be unwise to obtain a representation from the debtor that there is no chance of any type of reorganization or that the collateral is not, and never will be, necessary to any kind of plan of reorganization if there is, in fact, no credible basis for it. Indeed, it is difficult to understand how a

86. *Powers*, 170 B.R. at 484; *see also Darrell Creek*, 187 B.R. at 912 (citing *Powers*).

87. The Bankruptcy Code expressly provides that the party opposing relief from the automatic stay has the burden of proof on all issues except on the debtor's equity in the property. 11 U.S.C. § 362(g) (1994). "A creditor seeking relief from the automatic stay has the initial burden of producing evidence sufficient to establish a prima facie case of entitlement to relief," however. HON. BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 301.42 (1995-96 ed.); *see In re* McGuinness, 139 B.R. 3 (Bankr. D.N.J. 1992); *In re* Compass Van & Storage Corp., 61 B.R. 230, 234 (Bankr. E.D.N.Y. 1986); *In re* Rye, 54 B.R. 180, 181-82 (Bankr. D.S.C. 1985); Setzer v. Hot Productions, Inc. (*In re* Setzer), 47 B.R. 340, 345 (Bankr. E.D.N.Y. 1985).

88. *See Darrell Creek*, 187 B.R. at 912; *Powers*, 170 B.R. at 484.

89. United States Sav. Ass'n v. Timbers of Inwood Forest Assocs. Ltd., 484 U.S. 365, 375-76 (1988) (noting bankruptcy courts demand less detailed showing to continue the automatic stay during the four months in which the debtor is given the exclusive right to file a plan of reorganization).

90. Indeed, some commentators counsel that a lender should seek the following types of acknowledgements: (i) there is no equity in the collateral; (ii) the filing of a bankruptcy petition will constitute bad faith if the primary purpose is to delay a pending foreclosure; (iii) there is no defense to the lender's claim; and (iv) the collateral is not now, and never will be, necessary to any plan of reorganization. *See* Stephen M. Goldberg, *Counselor's Corner: Enforceability of Prebankruptcy Agreements Regarding the Automatic Stay*, 111 BANKING L.J. 200, 202 (1993); John P. McNicholas, *Prepetition Agreements and the Implied Good Faith Requirement*, 1 AM. BANKR. INST. L. REV. 197, 208-10 (1993); Peter S. Partee, *The Enforceability of Prepetition Waivers of a Debtor's Rights Under the Automatic Stay*, NORTON BANKR. L. ADVISER, Nov. 1992, at 5, 10.

91. *In re* Jenkins Court Assocs. Ltd. Partnership, 181 B.R. 33, 37 (Bankr. E.D. Pa. 1995).

92. *See, e.g.*, Goldberg, *supra* note 90, at 202; McNicholas, *supra* note 90, at 208-10; Partee, *supra* note 90, at 10.

debtor in many cases could determine, at any point in time before the filing of its bankruptcy case, that there is no plan of reorganization for which the collateral may be necessary. The prescience required of the debtor for this representation is extraordinary. If this kind of representation is given, though, there should be a credible basis for it. The lack of a credible basis for any representation of fact will surely lead to an allegation by the debtor, and an inference by the bankruptcy court, that the representation was coerced from the debtor. This, in turn, may taint the validity of an otherwise enforceable stay waiver.

Moreover, as a matter of good practical judgment, it is advisable to exercise restraint, as more is not necessarily better. A representation for which there is a credible foundation is more persuasive than an exhaustive list of representations that covers every conceivable ground for cause. Lenders should recognize that there is a point at which a debtor's admission of culpability for all the sins of the bankruptcy world leaves that which is admitted unbelievable and unpersuasive.[93]

EQUITY IN THE COLLATERAL

If the debtor has significant equity in the collateral, it is unlikely that a court will enforce a stay waiver.[94] The equity factor is closely intertwined

93. This form of representation was drafted by the author regarding the debtor's prospect of reorganization.

> *Form of Reorganization Representation.* The Borrower represents to the Lender that it has considered and evaluated the prospects and feasibility of the reorganization of its business under Chapter 11 of the Bankruptcy Code, including the sale of the business, the sale of all or substantially all of its assets, the restructuring of its assets and liabilities, and a liquidation. The Borrower represents to the Lender that, based on the foregoing consideration and evaluation, if the Borrower is unable to comply with, or otherwise defaults under, the Debt Restructure Agreement, the Borrower will not then have any realistic prospect of an effective reorganization. In the event that the Borrower files a petition under the Bankruptcy Code or under any other similar federal or state law, the Borrower hereby unconditionally and irrevocably agrees that it shall not, in any manner, oppose or challenge any assertion by the Lender that the Borrower does not have any realistic prospect of an effective reorganization unless, and only to the extent that, there has been a material change or material changes in the circumstances of the Borrower from the date hereof, which were not contemplated by or in the Debt Restructure Agreement. It shall be presumed that there has not been a material change in the circumstances of the Borrower unless each and every such material change is specifically identified by the Borrower and supported with adequate and competent evidence thereof.

See also supra note 77 and *infra* note 98. It is possible to broaden the representation to apply also to involuntary cases filed against the debtor. The author suggests, however, that the representation be limited to voluntary cases to avoid the appearance of overreaching by the lender.

94. *See, e.g., In re* Darrell Creek Assocs., L.P., 187 B.R. 908 (Bankr. D.S.C. 1995) (finding no equity supports enforceability of waiver).

with the reorganization factor. Lack of equity supports the contention that there is no realistic prospect of reorganization. Therefore, lack of equity in the collateral will offer strong support for the enforcement of the stay waiver. Of course, if the lender is able to establish that the debtor has no equity in the collateral and that the collateral is not necessary to an effective reorganization, the lender will be entitled to relief from the automatic stay pursuant to section 362(d)(2) of the Bankruptcy Code.[95] As previously discussed, however, even in these circumstances, a stay waiver may still be of value to the secured lender.[96]

It is useful to obtain a representation from the debtor as to its lack of equity in the collateral. Such a representation will be considered by the bankruptcy court in the lift-stay hearing with any additional evidence offered by the parties.[97] A no-equity representation should be obtained if there is a credible basis for it. It is also advisable to describe the basis for the no-equity representation. One of the most cogent and effective representations as to equity in the collateral is an admission by the debtor of the accuracy of the lender's appraisal. If the effective result of the appraisal is that there is no equity, the debtor, in effect, has admitted that there is no equity in the collateral and has adopted the grounds articulated in the appraisal as the basis for the appraised value. This is a persuasive representation that is usually amply supported by the detailed factual basis contained in the appraisal. Further, it would be difficult for a debtor to later claim equity in the collateral in the absence of a material change in circumstances.[98]

95. *See supra* note 83.

96. *See supra* notes 85-93 and accompanying text.

97. *In re* Jenkins Court Assocs. Ltd. Partnership, 181 B.R. 33, 37 (Bankr. E.D. Pa. 1995).

98. This form of representation was drafted by the author regarding the debtor's equity in the collateral.

> *Form of Equity Representation.* The Borrower represents to the Lender that it has been provided with and has carefully reviewed the appraisal of the Collateral of Acme Appraisers, which was obtained at the request of the Lender, including a review of the basis set forth in the appraisal for the opinion as to value expressed therein. The Borrower represents to the Lender that, based on its review of the appraisal and its own independent knowledge of the current and future use, and the current value of the Collateral, the Borrower is in agreement with both the opinion as to value expressed in the appraisal and the basis for such opinion set forth in the appraisal. In the event that a voluntary or involuntary petition under the Bankruptcy Code or under any other similar federal or state law is filed by or against the Borrower, the Borrower hereby unconditionally and irrevocably agrees that it shall not, in any manner, oppose or challenge the appraisal or any assertion by the Lender that the Borrower does not have any equity in the Collateral unless, and only to the extent that, there has been a material change or material changes in the circumstances affecting the value of the Collateral from the date hereof, which were not contemplated by or in the Debt Restructure Agreement. It shall be presumed that there has not been a material change in any circumstances affecting the value of the Collateral unless each and every such material change is specifically identified by the Borrower and supported with adequate and competent evidence

IMPACT ON OTHER CREDITORS

The effect of the enforcement of a stay waiver on other creditors may influence the judicial determination of the waiver's validity; the greater the impact on other creditors, the less likely its enforcement.[99] As previously noted, some courts have invalidated prepetition waivers on the basis that they harm other creditors and thus violate the equality-of-treatment principle of the Bankruptcy Code.[100] Sensitive to this concern, bankruptcy courts upholding prepetition waivers have examined their effect on third parties. At least one court has denied the enforcement of a prepetition stay waiver where several third parties filed objections to the creditor's lift-stay motion. In *In re Atrium High Point Ltd. Partnership*,[101] even though the court found stay waivers enforceable in certain circumstances and did not consider the debtor's objection to the motion to lift stay, it denied the creditor's motion for stay relief based on the objections of other creditors.[102] The court reached this result in spite of the fact that the waiver was part of a previous Chapter 11 plan that was approved by eight of the nine objecting creditors.[103] Thus, while it is possible that a court may not consider the objection of a debtor that has waived the automatic stay, other creditors will not be so precluded. Substantial weight will be given to the objections of creditors because of the concern that they will be adversely affected by the enforcement of the stay waiver.

The objections of third parties to the enforcement of a stay waiver, however, do not necessarily spell defeat. A bankruptcy court is unlikely to sustain third-party objections that do not set forth with particularity assertions of equity in the collateral or facts indicating a likelihood of reorganization. "Only hope objections," in which objecting creditors essentially assert that their only hope of getting paid is to allow the debtor to reorganize, will most likely be overruled.[104]

SINGLE-ASSET CASE v. BUSINESS ENTERPRISE CASE

The first courts to uphold prepetition waivers dealt with the issue in the context of single-asset real estate cases.[105] The rationale was to encourage

thereof.

See also supra notes 77 and 93. Note that this representation covers both voluntary and involuntary filings. Given the nature of this representation and the fact that it will be supported by an ample factual basis, there is less of a risk that it will be considered boilerplate.

99. *In re* Atrium High Point Ltd. Partnership, 189 B.R. 599, 606-08 (Bankr. M.D.N.C. 1995); *In re* Powers, 170 B.R. 480, 484 (Bankr. D. Mass. 1994).

100. *See In re* Pease, 195 B.R. 431, 434 (Bankr. D. Neb. 1996).

101. 189 B.R. at 599.

102. *Id.* at 608.

103. *Id.* at 608 n.7.

104. *See In re* Darrell Creek Assocs., L.P., 187 B.R. 908, 914 (Bankr. D.S.C. 1995).

105. *In re* Club Tower L.P., 138 B.R. 307 (Bankr. N.D. Ga. 1991); *In re* Citadel Properties, Inc., 86 B.R. 275, 276 (Bankr. M.D. Fla. 1988).

workouts and restructurings that essentially involved the debtor, a single creditor, and a single asset. While some courts have restricted the enforcement of stay waivers to single-asset cases,[106] other courts have expressly extended the enforceability of stay waivers to business enterprise cases.[107]

Nonetheless, the enforceability of a stay waiver is enhanced if the case is a single-asset case as opposed to a business enterprise case. A prepetition waiver is more likely to be enforced in a single-asset case because third parties are generally not burdened by its enforcement and the likelihood of the debtor's reorganization is often demonstrably low.[108]

It may be argued that the enactment of section 362(d)(3) of the Bankruptcy Code[109] militates against the enforcement of prepetition stay waivers in single-asset real estate cases. Because section 362(d)(3) provides enhanced remedies to a secured lender in certain single-asset real estate cases,[110] it has been argued by at least one court that there is less justification for enforcing prepetition waivers in those cases.[111] It is difficult, however, to understand why the enactment of section 362(d)(3) would effect a reduction of, rather than an addition to, the statutory grounds for stay relief. If a stay waiver is enforced, it is generally because the court determines that there is "cause" under section 362(d)(1).[112] Nothing in section 362(d)(3) purports to make section 362(d)(1) no longer applicable in single-asset real estate cases. The enactment of section 362(d)(3) did not make it the exclusive basis for lifting the automatic stay in single-asset real estate cases as defined in the Bankruptcy Code. Section 362(d)(3) should not operate to render prepetition stay waivers unenforceable in those single-

106. *See* Farm Credit of Cent. Fla., ACA v. Polk, 160 B.R. 870, 872-73 (M.D. Fla. 1993).

107. *See In re* Cheeks, 167 B.R. 817, 819 (Bankr. D.S.C. 1994); *Darrell Creek*, 187 B.R. 908.

108. It should be noted, however, that some courts have not followed this reasoning. In *Jenkins Court*, the court refused to enforce a prepetition waiver in a single-asset case, noting that, in such a case, the prepetition waiver is functionally equivalent to a restraint against filing for bankruptcy. *In re* Jenkins Court Assocs. Ltd. Partnership, 181 B.R. 33, 37 (Bankr. E.D. Pa. 1995).

109. The section was enacted on October 22, 1994, as part of the Bankruptcy Reform Act of 1994. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, 4128 (codified as amended at 11 U.S.C. § 362(d)(3) (1994)); *see also supra* note 83.

110. Section 362(d)(3) applies only to "single asset real estate," which is defined to mean

> real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent, liquidated secured debts in an amount no more than $4,000,000.

11 U.S.C. § 101(51B) (1994).

111. *In re* Pease, 195 B.R. 431, 435 (Bankr. D. Neb. 1996).

112. *Darrell Creek*, 187 B.R. at 915; *see In re* Atrium High Point Ltd. Partnership, 189 B.R. 599, 605 (Bankr. M.D.N.C. 1995); *In re* Wheaton Oaks Office Partners Ltd. Partnership, No. 92 C 3955, 1992 U.S. Dist. LEXIS 19983, at *7-*12 (N.D. Ill. Nov. 18, 1992); *see also supra* note 83.

asset real estate cases within its purview. To the contrary, section 362(d)(3) merely creates an additional basis for seeking relief from the automatic stay.

WHO MAY OBJECT TO THE ENFORCEMENT OF A STAY WAIVER?

Creditors and other parties in interest may object to a secured creditor's attempt to enforce a stay waiver.[113] As previously discussed, third-party objections should set forth with particularity assertions of equity in the collateral or facts indicating a likelihood of successful reorganization, but "only hope objections" will most likely be overruled.[114]

There is authority that a debtor that has waived the stay and agreed not to oppose stay relief is precluded from later objecting to a motion to lift the stay.[115] Secured lenders, however, should not count on being able to use a stay waiver to preclude subsequent objection by the debtor to stay relief. If there has been a material change in circumstances since the grant of the stay waiver or if a persuasive argument can be made by the debtor regarding equity in the collateral or the likelihood of a successful reorganization, a bankruptcy court is likely to hear from the debtor.

CLEAR AND CONSPICUOUS LANGUAGE

The stay waiver must be clearly and conspicuously brought to the attention of the debtor, as a bankruptcy court is unlikely to enforce a stay waiver if there is evidence that the debtor did not understand or could not have been expected to understand the waiver.[116] Therefore, it is advisable to put the waiver in capital or bold letters. A waiver is not likely to be enforced if it is ambiguous or inconspicuous, or if the debtor lacks the sophistication or counsel to understand and appreciate the consequences of the waiver.[117]

113. *In re* Cheeks, 167 B.R. 817, 819 (Bankr. D.S.C. 1994); *In re* Powers, 170 B.R. 480, 483-84 (Bankr. D. Mass. 1994).

114. *See Darrell Creek*, 187 B.R. at 914.

115. *Cheeks*, 167 B.R. at 819. *But see Powers*, 170 B.R. at 483-84 (stating the existence of a waiver does not preclude the debtor from objecting to stay relief). *Powers* is distinguishable, however, because the debtor did not appear to waive expressly its right to contest a motion for stay relief.

116. *Darrell Creek*, 187 B.R. at 913; *see In re* Riley, 188 B.R. 191, 192 (Bankr. D.S.C. 1995).

117. *Darrell Creek*, 187 B.R. at 913 (involving debtor who understood waiver and was represented by counsel during negotiations); *see Riley*, 188 B.R. at 191 (finding waiver not enforced where debtor was unsophisticated and waiver was ambiguous); *see also In re* Psychotherapy & Counseling Ctr., Inc., 195 B.R. 522, 535 (Bankr. D.C. 1996) (refusing to uphold waiver because of lack of specificity in language).

CONSIDERATION FOR THE WAIVER

The secured lender should provide valuable consideration for the stay waiver. A waiver will be viewed with more favor by a bankruptcy court if, in consideration of the waiver, the debtor received a significant benefit or the lender waived significant rights in reliance on the waiver.[118] There usually will be significant benefit to the debtor if the waiver is obtained in connection with a workout or restructuring. The greater the benefit to the debtor or the greater the detriment incurred by the lender in exchange for the waiver, the stronger the argument for enforcement.

For example, a waiver was upheld in a case in which the creditor agreed to contribute substantial resources through the release of its collateral and also agreed to dismiss a pending civil action against the debtor's guarantors.[119] In another case, the court held there was sufficient consideration for the waiver in the modification of an original loan agreement where, in exchange for the waiver, the debtor received a lower interest rate and a five-year extension of the loan.[120]

Is forbearance alone sufficient consideration? The answer probably will depend on the reorganization factor of the debtor. If the debtor has a realistic prospect of reorganization, it is doubtful that the lender's forbearance will be a significant factor weighing in favor of the enforcement of a stay waiver. On the other hand, the less likely the prospect of reorganization, the more valuable the lender's forbearance. This is not actually a matter of the forbearance becoming more valuable consideration. It is simply a consequence of the court requiring less to enforce a stay waiver once it is persuaded that there is no realistic prospect of reorganization.

Forbearance becomes a more important issue in the context of persuading the debtor to give a stay waiver. The debtor, if insolvent, can reasonably argue that to agree to a stay waiver may breach the fiduciary duty owed by its directors and officers to its creditors.[121] This is a signifi-

118. *Powers*, 170 B.R. at 484.

119. *Darrell Creek*, 187 B.R. at 913.

120. *In re* Atrium High Point Ltd. Partnership, 189 B.R. 599, 607 (Bankr. M.D.N.C. 1995).

121. It is well-settled that directors and officers of an insolvent company owe a fiduciary duty to the company's creditors. *See* Clarkson Co. Ltd. v. Shaheen, 660 F.2d 506, 512 (2d Cir. 1981) (holding directors' duty to creditors arises upon the company's insolvency); *see also* United States v. Spitzer, 261 F. Supp. 754, 756 (S.D.N.Y. 1966) (finding that, if the corporation was insolvent, officers and directors were to be considered trustees); Francis v. United Jersey Bank, 432 A.2d 814, 824 (N.J. 1981) (finding directors and officers of insolvent corporation owe a fiduciary duty to creditors); Whitfield v. Kern, 192 A. 48, 54 (N.J. 1937) (finding directors and officers of insolvent corporation owe a fiduciary duty to creditors); AYR Composition, Inc. v. Rosenberg, 619 A.2d 592, 597 (N.J. App. Div. 1993) (finding directors and officers of insolvent corporation owe a fiduciary duty to creditors); New York Credit Men's Adjustment Bureau, Inc. v. Weiss, 110 N.E.2d 397, 398 (N.Y. 1953) ("If the corporation was insolvent at that time it is clear that defendants, as officers and directors thereof, were to be considered as though trustees of the property for the corporate creditor-beneficiaries."). *See generally* Richard M. Cieri et al., *The Fiduciary Duties of Directors of Financially Troubled Companies*.

cant issue that is almost universally overlooked or disregarded by lenders in the negotiation of prepetition stay waivers.[122] It is not clear that mere forbearance will be sufficient consideration for the debtor to enter into a stay waiver and, at the same time, to discharge the fiduciary duty to the

3 J. BANKR. L. & PRAC. 405 (1994) (discussing the fiduciary duties of directors of financially troubled companies); Harvey R. Miller, *Corporate Governance in Chapter 11: The Fiduciary Relationship Between Directors and Stockholders of Solvent and Insolvent Corporations*, 23 SETON HALL L. REV. 1467, 1479-85 (1993) (discussing the fiduciary duties of directors of an insolvent corporation not subject to a case under the Bankruptcy Code); Gregory V. Varallo & Jesse A. Finkelstein, *Fiduciary Obligations of Directors of the Financially Troubled Company*, 48 BUS. LAW. 239 (1992) (discussing fiduciary obligations of directors of an insolvent corporation).

In addition, directors and officers of an insolvent company may be liable for preferring one creditor over another or for mismanagement. *See* Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (*In re* STN Enters.), 779 F.2d 901, 904 (2d Cir. 1985) ("[T]he 'majority rule' permits recovery by creditors of an insolvent corporation for mismanagement as if the corporation itself were plaintiff. . . ."); Federal Deposit Ins. Corp. v. Sea Pines Co., 692 F.2d 973, 976-77 (4th Cir. 1982) (finding directors of subsidiary breached fiduciary duty to creditors by mortgaging subsidiary's properties to the detriment of subsidiary and its creditors, and to the benefit of corporate parent); Singer v. Stevens (*In re* Stevens), 476 F. Supp. 147, 153 n.5 (D.N.J. 1979) (finding directors and officers of insolvent corporation owe a fiduciary duty to creditors and may not prefer one creditor over another); 15A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7369 (perm. ed. 1990) (footnote omitted) (noting "all of the assets of a corporation, immediately on its becoming insolvent, exist for the benefit of all of its creditors and . . . thereafter no liens nor rights can be created either voluntarily or by operation of law whereby one creditor is given an advantage over others").

Therefore, it may be argued that the directors and officers of the debtor may breach their fiduciary duty to the debtor's creditors by giving a prepetition waiver of the automatic stay without sufficient consideration. These creditors could argue that, by giving the waiver, the directors and officers gave the lender an unfair advantage over other creditors and effectively deprived these creditors of bankruptcy protection. In other words, the debtor's action deprived these creditors of the opportunity for the reorganization of the debtor and the maximization of the value of the debtor's assets for the benefit of all creditors. The unfair advantage to the lender is not the lien rights that a secured lender already enjoys over unsecured creditors but the contractual right to enforce its lien rights free of the strictures imposed on all creditors by the Bankruptcy Code. In the absence of the debtor's receipt of sufficient consideration for the stay waiver, it may be argued that the directors and officers of the debtor unfairly advantaged the secured lender to the detriment of the debtor and its creditors and, thereby, breached their fiduciary duty to creditors.

122. Lenders may ignore this issue at their peril. "[A] lender may run the risk of a claim for aiding and abetting a breach of fiduciary duty." Edward S. Adams & James L. Baillie, *A Privatization Solution to the Legitimacy of Prepetition Waivers of the Automatic Stay*, 38 ARIZ. L. REV. 1, 30-31 (1996); *see* Samuel M. Feinberg Testamentary Trust v. Carter, 652 F. Supp. 1066, 1082 (S.D.N.Y. 1987) (quoting Binon v. Boel, 66 N.Y.S.2d 425, 429 (App. Div. 1946)) ("New York law clearly provides that 'those who conspire with and induce directors to breach their fiduciary duties are liable for any damages which ensue.'"); Seigal v. Merrick, 422 F. Supp. 1213, 1219 (S.D.N.Y. 1976) (quoting Oil & Gas Ventures-First 1958 Fund, Ltd. v. Fung, 250 F. Supp. 744, 749 (S.D.N.Y. 1966)) ("'One who knowingly participates in or joins in an enterprise whereby a violation of a fiduciary obligation is effected is liable jointly and severally with the recreant fiduciary.'"); *see also* Crowthers McCall Pattern, Inc. v. Lewis, 129 B.R. 992, 999 (Bankr. S.D.N.Y. 1991) (discussing lender's liability for aiding and abetting a debtor's directors in a fraudulent conveyance).

debtor's creditors. It becomes especially dubious consideration if the parties are aware that forbearance alone likely will not enable the debtor to avoid bankruptcy.

Lenders should exercise caution if forbearance is the only consideration for the stay waiver and if it is reasonably clear that forbearance alone is not a realistic solution to the debtor's problems. In these circumstances, a better argument can be made that the debtor's directors and officers will breach their fiduciary duty to creditors by giving the waiver.[123] This issue can be largely avoided, however, by ensuring that valuable consideration, besides forbearance, is given by or on behalf of the lender for the stay waiver. Such consideration usually is present if the waiver is given in the context of a workout.[124] Alternatively, the agreement to waive the automatic stay may provide expressly that the stay waiver is granted subject to, and is effective only to the extent that it does not result in a breach of, any fiduciary duty owed by the debtor's directors and officers to its creditors.

USE OF STAY WAIVERS IN ORIGINAL LOAN DOCUMENTS

It is very unlikely that a bankruptcy court will enforce a stay waiver contained in original loan documents. No reported case has ever enforced a prepetition waiver in original loan documents. In fact, the court in *Atrium High Point*, in upholding the validity of a prepetition waiver, noted that "[e]nforcing the Debtor's agreement under these conditions does not violate public policy concerns. This is not a situation where a prohibition to opposing a motion to relief from stay was inserted in the original loan documents."[125]

Contrary to the counsel of at least one commentator,[126] it is inadvisable, for several reasons, for lenders to use stay waivers in their original loan documents. First, they are unlikely to be enforced. Bankruptcy courts view stay waivers obtained in a workout context differently from waivers that are part of standardized loan documents. The former is the product of a

123. It is questionable whether the grant of a prepetition waiver could be challenged as a voidable preference or a fraudulent conveyance. It seems difficult to argue that the grant of a prepetition stay waiver is a preference because the waiver does not really transfer any interest of the debtor in property. In fact, the debtor is incapable of relinquishing the protection of the automatic stay in the absence of an order of the bankruptcy court granting stay relief. Moreover, even if the grant of the waiver were such a transfer, it is unlikely that the waiver would allow the secured lender to receive more than it would have received in a Chapter 7 liquidation. The argument is no less difficult for a fraudulent conveyance challenge. To the extent that these arguments are made, however, they would be asserted at the time the secured lender seeks to enforce the stay waiver. Accordingly, these arguments would be effectively determined in the court's decision to enforce or not enforce the prepetition waiver.

124. Such consideration may include an extension of the loan term, a lower interest rate, a new loan, or reduced financial covenants.

125. *In re* Atrium High Point Ltd. Partnership, 189 B.R. 599, 607 (Bankr. M.D.N.C. 1995).

126. *See* Partee, *supra* note 90, at 10.

unique set of circumstances that has actually occurred, while the latter, it may be argued, is merely the proverbial "kitchen sink" that lenders are reputed to extort from borrowers. Second, there is already a demonstrated reluctance among some courts to enforce stay waivers. By adopting boilerplate stay waivers in original loan documents, lenders risk "poisoning the well" that has been created by the judicious use of stay waivers in workouts. Finally, the use of a stay waiver in original loan documents may taint the use by the lender of a stay waiver in a subsequent workout with the same borrower, thereby leading a bankruptcy court to decline to enforce the waiver in the workout agreement as well as the one in the original loan documents.

CONCLUSION

Prepetition waivers of the automatic stay are a useful device to contend with the bankruptcy of certain borrowers following a debt restructuring. Their usefulness, however, is limited. As a practical matter, a stay waiver by itself will not result in stay relief if the circumstances for stay relief under section 362(d) of the Bankruptcy Code[127] do not otherwise exist. In the instances in which a stay waiver is enforced, a bankruptcy court likely would have granted the secured lender stay relief anyway on the basis of cause under section 362(d)(1),[128] including a bad-faith bankruptcy filing or the inability of the debtor to reorganize, or under section 362(d)(2).[129]

Nonetheless, a stay waiver may still provide advantages to the secured lender. At a minimum, it will provide an additional argument for lifting the automatic stay. It may preclude the debtor from objecting to the motion for stay relief. It may shift the burden of production in the lift-stay hearing from the moving creditor to the debtor. Finally, it may reduce the home-court advantage that the debtor often enjoys in litigating in bankruptcy court. A debtor that attempts to backpedal from a prepetition stay waiver and properly supported no-equity and no-reorganization representations will likely have a difficult time before the bankruptcy court and probably will not be allowed the same deference bankruptcy courts usually afford debtors-in-possession at the beginning of a Chapter 11 case.[130] While this may be an intangible benefit to the secured lender, its value should not be overlooked.

The use of stay waivers should be judicious. Contrary to the advice of some commentators,[131] stay waivers should not be automatically used in all workouts. Such use is unwise, shortsighted, and a testament to the ability of lawyers to mesmerize themselves with their own creations.[132] As demonstrated in this Article, the enforcement of stay waivers is limited to cases in which the debtor has no realistic prospect of reorganization. It is exceedingly unlikely that a stay waiver will be enforced in circumstances in which the debtor has a realistic prospect of reorganization. In addition, the indiscriminate use of stay waivers will dilute, and ultimately destroy, their value.[133] The inappropriate use of stay waivers will lead bankruptcy courts—many of which already exhibit a general reluctance to enforce stay waivers—to reject them in broad terms that may then be used to support the argument that stay waivers are unenforceable *per se*.

Only a few years ago, stay waivers were universally believed to be unenforceable. Notwithstanding their relatively short history and the protestations of some courts that continue to say stay waivers are unenforceable *per se*, many lawyers now advise using stay waivers as a standard item in workouts. It has even been suggested by one commentator that the failure to recommend the use of a stay waiver may constitute malpractice![134] In a brief span of time, it appears lawyers have gone from a belief that stay waivers are unenforceable to a belief that their creation is so essential that

127. *See supra* note 83.

128. *Id.*

129. *Id.*

130. A lender with a prepetition stay waiver generally will seek to enforce the waiver and lift the automatic stay near the commencement of the bankruptcy case.

131. *See, e.g.*, Adams & Baillie, *supra* note 122, at 30; McNicholas, *supra* note 90, at 209. At least one commentator has sounded a false alarm by suggesting that "lenders' counsel may expose themselves to allegations of negligence by not recommending the use of such waivers in original loan documents and in workout agreements." Partee, *supra* note 90, at 10. For the reasons discussed in this Article, the use of stay waivers in original loan documents and their indiscriminate use in workout agreements are ineffective and potentially destructive to the device.

132. Credit is given to Harvard law professor Louis Loss, who, the author believes, coined (in slightly different terms) the expression regarding this singular ability of lawyers. *See* Louis Loss, *The Fiduciary Concept as Applied to Trading by Corporate "Insiders" in the United States*, 33 MOD. L. REV. 34, 40-41 (1970).

133. A classic example of when *not* to use a stay waiver occurred during the writing of this Article. The author assisted the general counsel of a borrower in the negotiation of a five-month forbearance agreement to permit the consummation of an existing contract for the sale of the collateral by the single-asset borrower. The matured loan was in the amount of $29 million. The sale price was significantly in excess of the loan amount, which would assure the lender of the full payment of its loan on the sale. In consideration of the forbearance, the borrower agreed to pay the lender a fee of $150,000. The lender unrelentingly sought a prepetition stay waiver from the borrower. The lender's attempt to use a stay waiver in circumstances in which there was a realistic and imminent likelihood of successful reorganization, substantial equity in the collateral, and a significant fee being paid by the borrower is a clear example of the indiscriminate use of a stay waiver. It is exceedingly unlikely that even the most ardent supporters of stay waivers would enforce a waiver in these circumstances. Moreover, and more importantly, the use of a stay waiver in such circumstances, if litigated, is likely to draw the ire of bankruptcy judges and will result in unfavorable case law that surely will undermine the legitimate use of stay waivers. Incidentally, the borrower refused to give the stay waiver.

134. Partee, *supra* note 90, at 10. As previously discussed, this suggestion is simply wrong. *See supra* note 131.

it may be tantamount to professional negligence not to recommend their use in all workouts.

Contrary to what may be the prevailing view among many commentators, prepetition waivers of the automatic stay should be limited to workouts in which the lender *reasonably* believes the debtor would have no realistic prospect of reorganization should the debtor be unable to succeed following the workout.[135] In such cases, enforcement is much more likely. If lenders resort to prepetition stay waivers as a standard provision in original loan documents or in forbearance agreements, or if lenders use them indiscriminately in workouts, one should expect an increasing number of cases rejecting the enforcement of stay waivers. When stay waivers are rejected by courts in egregious or otherwise inappropriate cases, one should also expect that the language of the rejecting court will be as resolute and unqualified as that of the opinions in the few legal precedents that form the basis for stay waivers. Ultimately, this will lead to the demise—ironically, at the very hands of those whom it served—of a useful device to contend with the post-workout bankruptcy of certain borrowers.

135. There should be an objective basis for the lender's belief that there is no realistic prospect of reorganization. The instinctive reaction of some loan officers in the event of a debtor's default under a loan agreement is that the debtor has no ability to reorganize. This reaction is not usually grounded in an analysis of the options available to the debtor in a Chapter 11 reorganization but on the observation that the debtor cannot perform under the terms of the loan as originally structured. Needless to say, the former and not the latter should form the basis of the lender's belief as to the debtor's prospect of reorganization.